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SUPREME COURT, U.S.

No. 07-1509

IN THE

Supreme Court of the United States

TINCY ANTHONY, Administratrix of the
Succession of James Louis Bankston, Sr.,
real party in interest James Louis Bankston, Sr.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ Of Certiorari
To The Court Of Appeals For the Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The United States argues no conflict between the circuits here needing the Court's resolution because, at least according to the United States, Treasury Regulation Section 20.7520-3(b) supercedes the case law for decedents dying after December 13, 1995. In other words, the United States proposes that the regulation revokes the established jurisprudential principal adopted by *O'Reilly v. Commissioner*, 973 F.2d 1403 (8th Cir. 1992), and followed by *Shackleford v. United States*, 262 F.3d 1028 (9th Cir. 2001), and *Estate of Gribauskas v. Commissioner*, 342 F.3d 85 (2d Cir. 2003), which requires departure from the tables — by both the taxpayer and the government alike — where the tables produce a substantially unrealistic and unreasonable result.

But that reading of the regulation is for sure not correct. The regulation's preamble itself states that "these regulations generally adopt principals established in case law and published IRS positions". And then the preamble cites *O'Reilly v. Commissioner, supra.*, as a specific example of the established case law that continues. Finally, the preamble explains that "(t)here is no indication that Congress intended to supersede this well-established case law . . . when it enacted section 7520."

Accordingly, the principal that departure from the tables is necessary if the tables produce a substantially unrealistic and unreasonable result is alive and well, unless, of course, the taxpayer happens to fall within the jurisdiction of the Fifth Circuit where a different and conflicting law

applies, namely, this case and *Cook v. Commissioner*, 349 F.3d 850 (5th Cir. 2003).

Except in the Fifth Circuit where *Cook, supra.*, and this case are the law:

> "To the extent the Estate argues that notwithstanding *Cook*, the language of Section 20.7520-3-(b) is broad enough to permit this Court to adopt a non-marketability exception, we decline to do so. This exception was rejected by *Cook*. The principles that guided *Cook* also guide us even with a new regulation as part of the direction given." *Anthony v. U.S.*, 520 F.3d 374, 383 (5th Cir. 2008).

Treasury Regulation Section 20.7520-3(b)(1)(ii) clearly states that the tables may not be used to value a restricted annuity:

> "A restricted beneficial interest is an annuity . . . that is subject to any contingency, power, or other restriction, whether the restriction is provided for by the terms of the trust, will, or other governing instrument or is caused by other circumstances. In general, a standard section 7520

annuity . . . factor may not be used to value a restricted beneficial interest."

Conclusion

Treasury Regulation Section 20.7520-3(b) does not supercede or revoke prior case law, and so the law in the Second Circuit and the Ninth Circuit is different from and conflicts with the law in the Fifth Circuit. The Court must resolve the conflict, one way or the other.

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